

Neat (Migration) [2020] AATA 3792 (10 September 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Gary Neat

VISA APPLICANT: Ms Wei Chang

CASE NUMBER: 1732583

DIBP REFERENCE(S): BCC2016/2119142

MEMBER: Russell Matheson

DATE: 10 September 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.

Statement made on 10 September 2020 at 10:47am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – spouse – validly married in visa applicant’s home country – financial, household and social aspects of relationship – nature of commitment – intention to open own business – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 375A

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 November 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant (the applicant) is a 53-year-old female national of China. She applied for the visa on 21 June 2016 based on her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the applicant is the spouse of the sponsor.
4. The review applicant (the sponsor) appeared before the Tribunal on 6 August 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant via telephone.
5. The review applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

7. Background

8. The applicant is a 53-year-old female from Dalian, China. She declares that she was previously married between September 1988 and divorced in October 2014. The applicant declares that there is one son from the relationship recently deceased. She further declares that her parents reside in China and her brother is recently deceased.
9. The sponsor is a 57-year-old male born in Australia residing in Seven Hills, New South Wales with the applicant's sister and her son. He declares no previous marriages or children; his parents are deceased, and his sister resides in Australia.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
11. The Tribunal has before it the Departmental file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor to the Tribunal.
12. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record. _

13. Hearing

14. Section 375A certificate

15. The Tribunal told the applicant that certain information in the Department file is the subject of a s.375A certificate.
16. This certificate prevents the Tribunal disclosing any document, matter or information referred to in the certificate as it would be contrary to the public interest because:
 - (a) Folio 145 contains information regarding Departmental risk systems and information regarding a person who is not the review applicant, namely the recording of adverse information regarding a third party (named on certificate) migration history in a Client of Interest (COI) note.
17. The certification is made on the basis that this information contains details relating to the Department's risk management and mitigation systems and procedures, and that disclosure of this information may prejudice the effectiveness of these methods.
18. Further, the information in the folio contains personal information relating to individuals other than the sponsor or applicant and the person has not consented to the disclosure of the information.
19. As s.375A applies to the information identified, the AAT must do all things necessary to ensure the information is not disclosed to any person other than to a member of the AAT as constituted for the purposes of this particular review, pursuant to s.375A(2)(b) of the Act..
20. The Tribunal informed the applicant that it considered the certificate valid and did not provide a copy of the certificate to the applicant as it identified a third person by name on the certificate. The Tribunal asked the applicant if she wished to comment on the validity of the certificate. The applicant did not respond.
21. The Tribunal has considered the information that is the subject of the certificate and is of the view, that as the information relates to Department procedure, it is not relevant to this review and the Tribunal places no weight on the information under the certificate.

Whether the parties are in a spouse or de facto relationship

22. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
23. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

24. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered by the Dalian Municipal Civil Affairs Bureau indicating the parties were married in Dalian, China, on 8 October 2015. There is no evidence before the Tribunal to indicate the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
25. After careful consideration of all the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
26. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal discussed issues and inconsistencies in evidence by the parties mentioned in the delegate's decision record. The parties responded to several inconsistencies in evidence via correspondence through their migration agent dated 3 August 2020. The Tribunal considered the oral evidence and written response given by the sponsor and the applicant to be persuasive and overall credible although at times during the hearing they appeared well versed.

Are the other requirements for a spouse relationship met?

27. *Financial aspects*

28. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
29. The Tribunal notes that the sponsor has provided sixteen international money transfer receipts issued by the Commonwealth Bank of Australia (CBA), indicating that he has sent money to the applicant on various occasions throughout the period October 2015 – January 2017. The applicant has provided her Bank of China transaction records for the period April 2014 – February 2017 which indicate that she received the corresponding amount of money from the sponsor. Also, in 2016, the sponsor transferred AUD 72,850 to the applicant which is a significant amount given that he has declared an annual income of AUD 90,000 – 100,000. The Tribunal questioned the sponsor about why he had transferred such a significant portion of his income to the applicant. At the Tribunal hearing the sponsor gave evidence that he provides financial support to the applicant and her parents. Both parties declared that this money was used to support the applicant with her daily living expenses, mortgage, renovations to the applicants home and business and for the care and support of the applicant's father who has been placed in a nursing home. The Tribunal accepts that the sponsor has made these fund transfers to the applicant, but there is limited evidence supporting the parties' claims that this money has been used to fund the applicant's day-to-day living expenses. Both parties had a sound knowledge of each other's financial resources, income, assets and employment. The sponsor also provided a copy of his will dated June 2018 and superannuation dated August 2020 indicating that he has left all his property and finances to the applicant.

30. The applicant and sponsor provided limited evidence regarding the financial aspects of their relationship, including evidence of any pooling of financial resources, sharing of day-to-day expenses or shared financial commitments for their life together as spouses.
31. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share day-to-day living expenses or pool their financial resources.
32. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds based on the evidence before it, that the sponsor has provided significant financial support to the applicant. The Tribunal places some positive weight on this aspect of the relationship.

33. *Nature of the household*

34. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, if any, living arrangements of the parties and the sharing of the responsibility for housework.
35. The Tribunal accepts there is a degree of difficulty in establishing a joint household when the parties live in separate countries at the present time. The parties declared that the sponsor visited the applicant in China and Taiwan seven times over the course of their relationship on the following dates:
- 10 February 2012 to 20 February 2012;
 - 2 December 2013 to 7 December 2013;
 - 16 September 2014 to 23 September 2014;
 - 1 April 2015 to 30 April 2015;
 - 3 October 2015 to 13 October 2015;
 - 26 February 2017 to 3 March 2017; and
 - 4 November 2018 to 15 November 2018 (trip to Taiwan).
36. The sponsor has provided a Temporary Residence certificate indicating that he was registered to stay at the Tang Yin Hotel in Dalian from 3 April 2015 to 30 April 2015 and also provided a receipt for the same hotel as evidence of the parties co-habitation for the period 4 October 2015 to 12 October 2015. The Tribunal accepts the sponsor may have stayed at the hotel in October 2015 and that he was permitted to stay in Dalian during the time stated on the certificate in April 2015. The Tribunal does not accept that these documents are in themselves evidence of cohabitation as there is little other supportive evidence such as photographic evidence that indicates the parties stayed together during the abovementioned times.
37. The parties provided to the Tribunal a copy of the sponsor's flight itinerary to Shanghai, China and the hotel itinerary for the couple's stay for their joint trip in Shanghai, China in 2017; exit and entry permit for Taiwan Republic of China issued to the applicant for the

couple's joint travel to Taiwan in 2018; and a copy of their Taiwan hotel itinerary for the couple's joint trip in 2018.

38. The sponsor gave evidence that when he visits the applicant, he stays at a hotel near the applicant's residence because it is more comfortable for the parties because the applicant's living conditions are very basic. The Tribunal accepts the sponsor resides at hotel accommodation when visiting the applicant in China. The parties stated that they share the responsibilities of the household equally. The parties provided broadly consistent and detailed oral evidence of their activities and living arrangements when together in China including the sharing of household duties and responsibilities. The applicant gave evidence she closed her business, or her son would take care of her business when the applicant visited her in China so she could spend as much time as possible with the sponsor. The sponsor gave evidence that he is now retired and has sold his residence in Australia and is currently living with his sister-in-law and her son and the parties would all live together in Australia. He further stated that he has informed the Department of his current living arrangements. Although the Tribunal has some concerns regarding the parties' living arrangements in China when the sponsor visits the applicant the Tribunal found the parties oral evidence persuasive.
39. Based on the evidence presented by the parties, the Tribunal accepts that they live together and have established a joint household together and that they share the responsibility for the housework when the sponsor visits the applicant in China. The Tribunal places some weight on this aspect of the relationship.

40. Social aspects

41. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
42. The Tribunal has considered the statutory declarations made by the sponsor's friend and cousin. The statements give no insight into the inception or development of the relationship over time and only give an account indicating that they have known of the applicant based solely on the sponsor's account of the relationship. The Tribunal places limited weight on the statements provided as independent witnesses' accounts of the claimed relationship.
43. The parties provided limited photographs taken with third parties in China as evidence of the social recognition of their relationship. The Tribunal has put some positive weight on this evidence as being somewhat supportive of their claim that their marriage and spousal relationship are socially recognised by family and friends.
44. The parties provided a copy of the delegate's decision to the Tribunal and the Tribunal considered the circumstances of the parties' wedding celebrations and inconsistencies when providing information to the Department with the visa application and in the context of how the applicant and sponsor have represented themselves as spouses. At the hearing the sponsor gave evidence that his wife's mother, sister and nephew attended their wedding celebrations and he could not genuinely remember if the applicant's son attended because his memory is not the best. The applicant's response was the same other than stating that her son did not attend because he was working in the city. The parties claim some of the inconsistencies in the information provided to the Department were due to misinterpretation and the applicant's limited understanding of the English language at the time of interview.
45. Given the significance of the wedding ceremony as a memorable occasion in their relationship with very few people in attendance the Tribunal finds it reasonable to expect that

the sponsor would clearly remember if the applicant's son was there. This raises concerns with the Tribunal as to the genuineness of the relationship. The Tribunal is prepared to give the sponsor the benefit of the doubt as the ceremony occurred nearly five years ago.

46. Overall, the Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

47. Commitment

48. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
49. The applicant and sponsor claim to have been introduced to each other by the applicant's sister online in May 2012 and first met each other in person in February 2012 with the sponsor proposing in September 2014. The parties were married on 8 October 2015. They have provided a copy of the marriage certificate registered in China. The Tribunal accepts the parties are lawfully married and have been in a relationship for over eight years. The sponsor has visited the applicant several times during the time of the relationship cohabiting with the applicant at hotels in China and Taiwan. The Tribunal has put some weight on this fact as evidence that would indicate they are in a committed long-term relationship.
50. The Tribunal acknowledges the parties have provided as evidence boarding passes, admission tickets and photographs presented with the application which demonstrate that the parties have travelled and spent some time together in China and Taiwan and that this demonstrates a level of commitment to each other. The Tribunal accepts on the documentary evidence provided that the sponsor provides significant financial support to the applicant and her parents. The Tribunal has put some positive weight on this evidence in this regard.
51. The Tribunal accepts that the sponsor has made the applicant a beneficiary in his will and superannuation. The Tribunal does not accept that in and of itself this is evidence of being in a committed relationship as a will can be altered at any time and the superannuation agreement provided is non-binding.
52. The parties stated that they intend to live with the applicant's sister in Australia and have intentions of opening their own restaurant. The applicant and sponsor provided evidence of their future financial plans and resources to achieve their goal. The parties also stated that they intended to travel together in the future and the applicant intends to improve her English-speaking capabilities. The parties stated they have previously transmitted messages using the WeChat translation functionality, use of body language, and used family members to translate and communicate with each other. The Tribunal notes during the hearing the applicant had a reasonable understanding of the English language when interacting with the Tribunal and interpreter.
53. The parties presented limited evidence of continued daily contact via WeChat and telephone during periods of separation but provided sound knowledge of each other's lives, family, living arrangements, health issues, personal history and future together. The evidence of communication between the parties is significant and the Tribunal considers the parties' knowledge of one another and their everyday concerns is a function of this communication.

54. The parties provided evidence of emotional support and care for each other during stressful times such as family tragedy and illness, particularly during the death of the applicant's son and brother in recent times. The parties claim they have suffered emotionally from the prolonged physical distance from each other since their marriage. The Tribunal accepts that there would be some degree of emotional suffering and is sympathetic to the applicant regarding the traumatic loss of her son and brother recently. The Tribunal accepts that the parties have a sound knowledge of one another and their families. They also provided evidence of their future together and belief that their relationship is long-term.
55. The Tribunal is satisfied they are in a marital relationship and have maintained their relationship over a significant period.
56. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. On balance, the Tribunal considers the evidence presented weighs in favour of the parties being in a genuine and committed relationship.
57. The Tribunal is satisfied the applicant and the sponsor provide each other with a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
58. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

59. Findings

60. Based on the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
61. Given these findings, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore, the visa applicant meets cl.309.211(2) and cl.309.221.
62. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor at the time of the visa application was an Australian citizen who had turned 18. Therefore, the applicant meets cl.309.212 and cl.309.213.
63. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

64. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).